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IN THE

**Supreme Court of the United States**

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ENVIRONMENTAL DEFENSE, *et al.*,

*Petitioners,*

v.

DUKE ENERGY CORPORATION,

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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# BRIEF OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, AND THE ELECTRIC RELIABILITY COORDINATING COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI CURIAE[1]

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (commonly referred to as "the Boilermakers Union") is a

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of *amici curiae* Boilermakers Union and ERCC was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici* and their staffs have made a monetary contribution to the preparation of this brief. The parties have granted consent for the filing of *amicus curiae* briefs.

diverse union representing over 70,000 workers throughout the United States and Canada in construction, repair, maintenance, manufacturing, professional emergency medical services, and related industries.

The Boilermakers Union is the principal union responsible for the installation, maintenance, and repair of industrial boilers, as well as the installation of the pollution control equipment utilized to achieve the emissions reductions that are the goals of the Clean Air Act, 42 U.S.C. §§ 7401 et seq. ("the Act"). As a result, the Boilermakers Union has a dual concern: first and foremost, to have safe and productive workplaces for boiler operations; and second, to ensure the sensible implementation of clean air standards that foster the market for Boilermaker services while protecting health, safety and the environment.

Boilermakers have been active participants in the policy making process regarding emissions control, power-plant maintenance, and related topics. Representatives from Boilermaker locals have testified at U.S. Environmental Protection Agency ("EPA") field hearings on the new source review ("NSR") enforcement program, and the Union's Government Affairs Office has submitted Congressional testimony and authored letters on clean-air topics including NSR.

The Electric Reliability Coordinating Council ("ERCC") is coalition of electric power-generating companies established in 2001 and dedicated to commonsense strategies for implementation and enforcement of the Act. ERCC has been particularly active in the public policy discourse regarding the NSR program. As a general proposition, ERCC has taken the position that the U.S. Department of Justice and EPA were not correct when they brought various NSR enforcement cases in 1999, specifically misstating the basis upon which construction activities may

trigger an NSR evaluation at existing facilities. In addition, ERCC has also supported clarification of the NSR program through the rulemaking and legislative processes, and has sought to explain the policy issues relevant to such clarification to the interested public.

Collectively, the members of ERCC generate electricity for millions of consumers in most regions of the United States. ERCC members have an obligation to provide reliable electrical service to these consumers and believe that the NSR program should not and need not force choice between reliable and efficient power production and environmental protection.

## SUMMARY OF THE ARGUMENT

It is the intention of this brief to place the question of the alleged need for NSR evaluation for construction and maintenance activities at existing facilities in a broader public policy context.

Whether an agency's reading of a regulation is inconsistent with a statutory mandate or would frustrate the congressional policy underlying a statute are properly within the province of a court addressing the agency's enforcement of the regulation. Therefore, administrative (including enforcement) decisions that are inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute should not be upheld. *See, e.g., NLRB v. Brown,* 380 U.S. 278, 291-92 (1965); *see also, FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 31-32 (1981) (noting that "administrative constructions of the statute, whether reached by adjudication or by rulemaking" must be rejected to the extent that such actions "frustrate the policy that Congress sought to implement" (citations omitted)); *FMC v. Seatrain Lines, Inc.,* 411 U.S. 726, 745-46 (1973); *Volkswagenwerk v. FMC,* 390 U.S. 261, 272 (1968).

While the present *amici* do not contend that policy objectives should substitute for sound legal reasoning in the enforcement arena, we do believe that the policy arguments create an important lens through which the purposes and objectives of proper enforcement initiatives can be usefully viewed. Further, the policy context propagated by *amici* allied with petitioners tends to misapprehend the alleged environmental consequences, understate potential environmental benefits, and ignore entirely other proven benefits to cautious application of NSR to construction and maintenance activities at existing facilities, such approach supported by EPA's clear and contemporaneous explanation of the meaning of the 1980 regulation at issue here.

The first section of this brief will place the NSR program and the legal standards arising there-under in the proper environmental policy context. The Boilermakers Union and ERCC will demonstrate that emissions are currently declining and will continue to decline; that NSR is not the basis of these declines; that an overbroad application of NSR will hamper the highly successful market approaches developed under the Act; and that such application can actually delay or prevent technological improvements needed for additional clean-air progress.

The second section of this brief will review distributional impacts that can arise from improper imposition of NSR on construction and maintenance activities at existing facilities. By restricting energy supply and undermining reliability, the petitioners' view of the law could wreak havoc on reliable supplies of electricity and industrial manufacturing and could result in harm to those in society least able to afford it: those living in poverty; the elderly and those on fixed incomes; majority-minority communities; and those living in rural areas seeking to diversify their economic base.

The last section of the brief will describe the unacceptable choice created by petitioners' interpretation in the area of occupational safety. No interpretation of the Act should place environmental and safety obligations at odds with one another, particularly when a commonsense, long-held interpretation avoids this Hobson's Choice altogether.

## ARGUMENT

### I. A "Modification" Test Triggered by Activity that Increases a Facility's Hourly Emissions Rate Is Consistent with Environmental Protection

As a primary matter, and contrary to the views expressed by *amici* allied with petitioners, criteria air emissions for stationary sources have been on a continual decline over the past two decades. As the EPA Air Trends report states in its executive summary: "Since 1970, aggregate emissions of the six principal pollutants have been cut 48 percent. During that same time, U.S. gross domestic product increased 164 percent, energy consumption increased 42 percent, and vehicle miles traveled increased 155 percent." Air Quality and Strategies Division, EPA, *Latest Findings on National Air Quality* 1 (2003) (No. EPA-454/K-03-001).

Under Phase I of the Title IV program alone, utilities reduced $SO_2$ emissions by eight million tons – nearly 50% below their 1990 emissions level and 30% below the Phase I cap. [1] Clean Air Markets Division, EPA, *1999 Compliance Report: Acid Rain Program* 2 and 5 (2000) (No. EPA-430-R-00-007). The environmental benefits of these reductions were catalyzed by the banking and trading mechanisms provided by the flexible cap-and-trade program – 75% of the total allowances created were banked and 30 of the 51 firms

used intra-firm averaging.[2] The success of cap-and-trade programs is not surprising – the programs integrate environmental decision-making into the financial reality that fuels companies.[3]

The NSR program hardly explains this positive and continuing trend in emissions reductions. Contrary to the statements of some, the NSR program is not the centerpiece of the Clean Air Act. Rather, it is a narrowly tailored program designed principally to address new sources (as the name implies), which includes modifications of existing sources, a relatively rare occurrence.

The lion's share of emissions reductions are related to implementation of the national ambient air quality standards as reflected in state implementation plans and, ultimately, in the permit conditions applicable at individual plants. The NSR program does not set or alter these standards.

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[2] Byron Swift, *Command Without Control: Why Cap-and-Trade Should Replace Rate Standards for Regional Pollutants*, 31 Envt'l L. Rep. (Envt'l Law Inst.) 10,330, 10,331 (2001) (citing Environmental Law Institute, Analysis of EPA 1995-1999 Compliance Reports). *See also,* Curtis Carlson, et al., *Sulfur Dioxide Control By Electric Utilities: What are the Gains from Trade?*, 108 J. of Pol. Econ. No. 6 1292, 1320 (2000) (concluding that "[t]he flexibility of the trading program has encouraged utilities to capitalize on advantageous trends, such as changing fuel prices and technological innovation that might have been delayed or discourage by traditional regulatory approaches.").

[3] *See also,* Byron Swift, *Allowance Trading and $SO_2$ Hot Spots – Good News from the Acid Rain Program,* 31 Env't Rep. (BNA) No. 19, at 957 (May 12, 2000) (concluding that "[t]hese data confirm a general prediction about cap and trade programs, that they will tend to create incentives for the dirtiest plants to clean up the most, as the per-ton cost of emissions reductions may be expected to be the least. . . . These data show that, if anything, trading may be expected to cool hot spots and not create them.").

The environmental and energy benefits of adhering to the historical meaning of the regulations providing that the NSR program is triggered only by "modification" activity (i.e., activity that increases a facility's hourly emission rate) that is "major" can be summarized as follows. Investments in pollution prevention and in maintenance are facilitated when the powerful disincentives created by inflexible NSR enforcement strategies are removed. As experts from Harvard University's Kennedy School of Government and from the think-tank Resources for the Future have written, "Research has demonstrated that the New Source Review process drives up costs tremendously (not just for the electricity companies, but for their customers and shareholders, that is, for all of us) and has resulted in worse environmental quality than would have occurred if firms had not faced this disincentive to invest in new, cleaner technologies." Howard Gruenspecht & Robert Stavins, Op-Editorial, *A Level Playing Field on Pollution at Power Plants*, Boston Globe, Jan. 26, 2002, at A15.

Considered authorities from the Massachusetts Institute of Technology and National Economic Research Associates, Inc. concluded that "a properly designed [emissions trading] program provides a framework to meet emissions reduction goals at the lowest possible cost . . . by giving emissions sources the flexibility to find and apply the lowest-cost methods for reducing pollution. . . . In practice, well-designed emissions trading programs also have achieved environmental goals more quickly and with greater confidence than more costly command-and-control alternatives." A. Denny Ellerman, Paul L. Joskow & David Harrison, Jr., *Emissions Trading in the U.S.: Experience, Lessons, and Considerations for Greenhouse Gases*, at iii (Pew Center on Global Climate Change, May 2003). The NSR enforcement initiative, by interposing such "costly command-and-control" requirements even as more effective

market-sensitive approaches are being pursued, frustrates effective implementation of the Act.

## II. The Historical NSR Test Results in Significant Distributional Benefits Over the EPA Enforcement Test

Simply put, the litigation-focused approach reflected in the 1999 EPA NSR enforcement initiative can create unacceptable burdens on those in society least able to afford it. First, if the environmentalist claims are taken at face value, it is clear that an effort is being made to undermine the future use of coal-fired power as an energy source in the United States. While petitioners have focused their efforts in the instant case on existing coal-fired facilities, allied organizations have displayed a disturbing reluctance to support the siting or development of new coal-fired power generation capacity, regardless of the technology utilized.

The problem with opposition to both old and new coal-fired capacity is that coal represents over half of U.S. electric generating capacity, and "more than 80 percent of America's known recoverable fossil fuel reserves." Illinois Clean Coal Institute, *Facts About Coal* (2003) ("Coal presently accounts for 55 percent of the electricity generated in the United States. Approximate totals for other fuels: nuclear, 21 percent; hydroelectric, 10 percent; natural gas, 9 percent; petroleum, 4 percent."), available at http://www.icci.org/news/fact.html.

Any interpretation of the Act designed to marginalize or eliminate such a major portion of electric-generating capacity does so with great economic impact to consumers on fixed incomes or those living at or near the poverty level. Viewed in the context of recent discussions on caps on carbon emissions, the Congressional Budget Office recently reflected upon these significant distributional impacts:

"The price increases resulting from a carbon cap would be regressive--that is, they would place a relatively greater burden on lower-income households than on higher-income ones. Higher-income households would face larger costs in dollar amounts, but those costs would make up a smaller share of their average annual income. For example, one study estimated that the price increases resulting from a 15 percent cut in carbon emissions would cost the average household in the lowest one-fifth of the income distribution about $560 a year, or 3.3 percent of its average income. Households in the top one-fifth of the income distribution would pay an additional $1,800 a year, or 1.7 percent of their average income." Congressional Budget Office, *Shifting the Cost Burden of a Carbon Cap-and-Trade Program*, at ix (July 2003).

Groups on the frontline of addressing the distributional impacts of energy costs have likewise commented on the relationship between inflexible Clean Air policy and unacceptable results for those living in poverty. Catholic Charities of Cleveland testified that, "conversion to natural gas from coal would have a devastating effect on the people of Ohio and our country, particularly the poor and the elderly." *Clean Power Act: Hearings on S. 556 Before S. Comm. on Env't & Pub. Works,* 107th Cong. 757 (2002) (statement of J. Thomas Mullen, President & CEO, Catholic Charities Health and Human Services). The group attempted to quantify the impact of such fuel conversion as follows:

"The overall impact on the economy in Northeast Ohio would be overwhelming, and the needs that we address at Catholic Charities in Ohio with the elderly and poor would be well beyond our capacity and that of our current partners in government and the private sector. In a recent study on Public Opinion on Poverty, it was reported that one-quarter of Americans report having problems paying for several basic necessities. In this study, currently 23% have difficulty

in paying their utilities - that is, one out of four Americans." *Id.*

The profound distributional impacts of an inflexible approach to NSR enforcement led the National Conference of Black Mayors, the National Indian Business Association, and three other African American groups to find that: "At the same time, however, local facilities that provide our communities with jobs and economic opportunity must be able to perform routine maintenance and add process improvements to keep their operations safe, reliable, productive and, importantly, to improve energy efficiency, decrease emissions and maintain competitive flexibility. In our view, the current NSR program, as applied, has a disparate impact on urban and minority communities by placing at risk economic and energy security and improvements in air quality." Steve Cook, *Black Mayors, Native American Group Call for Quick Action on New Source Review*, Daily Env't Rep. (BNA) No. 93, at A-2 (May 14, 2002).

Aside from adverse distributional impacts that manifest along socio-economic grounds, the EPA's enforcement approach to NSR results in adverse impacts along geographical grounds as well. Rural areas, in particular, are hard hit. The rural economy is increasingly attempting to diversify its base. Relying exclusively on agriculture is risky. In a real sense, the need to diversify the rural economic base is dependent on the availability of reliable and affordable electricity, a proposition made more difficult by an inflexible approach to NSR. Experts at the Center for Economic Development and Research at the University of North Texas wrote:

"Against this backdrop, [EPA's] new interpretation of the [NSR] rules will make a bad economic situation worse for rural America. This is particularly the case for

communities that are attempting to diversify away from commodities by attracting manufacturing enterprises, business services, tourism, and other growth industries. To the extent application of the NSR program to utilities and manufacturers serving or located in non-metropolitan areas inflates the cost of electric power or creates uncertainty about the reliability of delivery, businesses and households will be even less inclined to locate or expand in these communities." Bernard L. Weinstein, Ph.D. & Terry L. Clower, Ph.D., *The EPA's Reinterpretation of New Source Review Rules: Implications for Economic Development in Rural America* 1 (May 2002), available at http://www.unt.edu/cedr/NSR.pdf

Unfortunately all the above-cited groups may have severely *underestimated* the impact of EPA's enforcement interpretation of NSR. A basic unspoken premise of the enforcement initiative is that EPA had *never* previously interpreted NSR in the manner it seeks to in this and other enforcement cases. As respondents and other *amici* have cautioned, requiring NSR review and permitting for the common repair and replacement of utility unit and manufacturing components would mean minimum waiting periods of 6 to 22 months *every* time a plant is forced to shut down to repair or replace a component. *See, e.g., Amicus Curiae* Brief of American Public Power Association in the instant case. Moreover, electric utilities are particularly susceptible to periods of coincident peak demand, since demand is driven in large part by weather, and utilities are forced to operate more of their generating units during such peak demand periods. That means that the older and less reliable units are required to run, and if a unit breaks down, then its load must be picked up by another unit. Meanwhile, neighboring utilities are doing exactly the same thing.

But EPA's litigation position would make contemporaneous repairs during and following peak periods

a thing of the past. It would disrupt all repair planning and would eventually lead to idling large amounts of generation to wait for state and federal agency approval to undertake the types of repairs that have occurred forthwith for decades. The nation has never experienced the effects of EPA's enforcement interpretation, because EPA had never sought to reinterpret the 1980 rules in this manner. If EPA and petitioners have their way, the best outcome will be prolonged periods of idled manufacturing and electric generation capacity and the associated inability to meet citizen demand for basic necessities – electricity in the dark, cooling in the heat, heat in the winter, and the like. According to labor organizations, the impact on employment in industries attempting to compete in an international marketplace could create risk to tens of millions of jobs.[4] This does not and cannot reflect the balance between air quality and economic vitality that Congress so carefully considered when creating the NSR program.

## III. The Historical NSR Test Avoids Unacceptable Compromises Between Environmental and Occupational Safety Goals

A test under which NSR is triggered only for "modifications" that are "major" allows for common repair and replacement activities by avoiding the simplistic notion that a mere increase in hours of operation can trigger the program. The Boilermakers Union, along with many labor

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[4] Letter from Bill Cunningham, President, Unions for Jobs and the Environment, to Congressmen Joe Barton and John Dingell (Oct. 5, 2005) ("Further, by reducing the useful economic life of boilers or by inaccurately setting baselines, the existing NSR confusion undermines the competitiveness of American job sites. The result is that some of the almost 20 million manufacturing jobs at stake in heavy industry are placed at risk."), available at http://www.eenews.net/EEDaily/Backissues/images/100605dr1.pdf.

organizations,[5] has pointed out that these efforts can pay tangible dividends in the form of enhanced workplace safety. Boilers at industrial facilities or electric utilities are subject to constant stress and pressure.

For their part, Boilermakers have historically supported tough air pollution standards -- while at the same time casting a wary eye for those policies that may impact on safety or competitiveness in these workplaces. The Boilermaker position was explained in Senate testimony:

"Boilermakers could not support the EPA's 1999 recent interpretation of its authority under the [NSR] program. NSR, correctly interpreted, as we believe the Administration's clarification does, forces new sources or those undergoing major modifications, to install new technology...We support NSR in that context. But, when NSR is applied to the routine maintenance policies and schedules of existing facilities, very different results occur. In those cases, facilities are discouraged from undertaking routine actions for fear of huge penalties or long delays or both. By applying NSR in that way, we are pretty sure that Boilermakers won't have the opportunity to work on maintenance projects that we know are extremely important

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[5] Other unions agree with the need for clarification of the NSR program. One coalition of some ten manufacturing unions, Unions for Jobs and the Environment, has written that, "A number of industry and labor groups have complained that changes in EPA rules in 1997 made the definition of routine maintenance unclear. Because of those changes, what was previously regarded as routine maintenance now requires an investment in pollution control equipment as if the facility were newly built. Uncertainty about the rules can cause a delay of maintenance, often affecting health and safety, or result in the closure of the plant and the loss of jobs." *Modification of New Source Review*, Unions for Jobs and the Environment Newsletter, Apr.-June 2002, at 2, available at http://ujae.org/NewsRes/ujae%20newsletter%20apr%20jun%202002.pdf.

to energy efficiency." *New Source Review Policy, Regulations and Enforcement Activities: Joint Hearing Before the S. Comm. on Env't & Pub. Works and the S. Comm. on the Judiciary,* 107th Cong. 25-26 (statement of Ande Abbott, Director, Legislative Department, International Brotherhood of Boilermakers) (also citing the experience of the California and New York electricity crises, the Boilermakers Union testified that NSR enforcement should not be allowed "to play with the reliability of the power grid.") [hereinafter, "Boilermakers Testimony"].

Upon passage of the Occupational Safety and Health Act of 1970 ("OSH Act"), Congress declared its "purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b); *see Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 102 (1992) ("Our review of [OSH Act] persuades us that Congress sought to promote occupational safety and health while at the same time avoiding...possibly counterproductive regulation."). *Amicus* Boilermakers Union, in testimony before Congress, explained that, "maintenance is necessary to maintain worker safety. Electric generating facilities harness tremendous forces: superheater tubes exposed to flue gases over 2000 degrees; boilers under deteriorating conditions; and parts located in or around boilers subjected to both extreme heat and pressure. Any EPA interpretation which creates incentives to delay maintenance is simply unacceptable to our workers." Boilermakers Testimony at 26. The Boilermakers Union later testified that, "the threat of litigation too often acts as a deterrent to capital investments that create work and maintain safe facilities for our members." *Clear Skies Act of 2005: Hearing on S. 131*

*Before the S. Comm. on Env't & Pub. Works*, 109th Cong. (statement of Abraham Breehey, Legislative Representative, Government Affairs Department, International Brotherhood of Boilermakers) (Feb. 1, 2005), available at http://epw.senate.gov/hearing_statements.cfm?id=231305.

## CONCLUSION

Proponents of the EPA interpretation, with its broad application of NSR to construction and maintenance activities at existing facilities, have often portrayed the issue as a Manichean dispute between environmental right and wrong. In reality, and unsurprisingly, the issues are more complex. In fact, when viewed in proper context, the historical test governing what is "construction" that triggers NSR (as opposed to EPA's interpretation in the instant enforcement case) is more consistent with effective Clean Air Act emissions control, and better preserves electric reliability, efficiency, affordability, and occupational safety.

Respectfully submitted,

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